

**Appeal No. 03-1855**

**Cir. Ct. No. 02CV002590**

**WISCONSIN COURT OF APPEALS  
DISTRICT IV**

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**PATRICK G. SCHILLING,**

**PETITIONER-RESPONDENT,**

**FILED**

**V.**

**APR 1, 2004**

**STATE OF WISCONSIN CRIME VICTIMS RIGHTS BOARD,**

Cornelia G. Clark  
Clerk of Supreme Court

**RESPONDENT-APPELLANT.**

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**CERTIFICATION BY WISCONSIN COURT OF APPEALS**

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Before Deininger, P.J., Vergeront and Lundsten, JJ.

The “victims of crime” amendment, WIS. CONST. art. I, § 9m, provides that “[t]his state shall treat crime victims ... with fairness, dignity and respect for their privacy.” The State Crime Victims Rights Board concluded that a state prosecutor violated this constitutional provision when, at a sentencing on first-degree intentional homicide attended by the murder victim’s family, the prosecutor, without warning to the family, played a 911 tape that recorded the voice of the victim’s child reporting the murder.

The question presented is whether the constitutional language quoted above, by itself, creates a distinct enforceable right to be treated with fairness, dignity, and respect, or whether, instead, this language is a statement of general purpose intended to provide guidance in enforcing rights thereafter specified in the amendment.

## BACKGROUND

Price County District Attorney Patrick Schilling successfully prosecuted Daniel Marinko for the murder of his ex-wife, Jennifer Marinko. At sentencing, attended by members of Jennifer's family, prosecutor Schilling began playing the tape of the 911 call Jennifer's son made after the son discovered his mother's body. Prosecutor Schilling recognized the powerful emotional content of the tape and played it to influence the sentencing court's decision. However, he did not warn family members of his decision to use it. Trial attendees described the tape as highly upsetting. It had a "dramatic effect" on the attending family members. Prosecutor Schilling stopped the tape when he observed this effect.

Jennifer's family members, unhappy about the 911 tape incident and other aspects of the prosecutor's handling of the case, complained to the Crime Victims Rights Board. After an evidentiary hearing, the Board found that prosecutor Schilling had not violated any of the specifically enumerated rights in WIS. CONST. art. I, § 9m, or in WIS. STAT. ch. 950 (2001-02), the legislation enacted to enforce the amendment.<sup>1</sup> However, the Board concluded that, by playing the 911 tape without warning the family, prosecutor Schilling failed to treat the family with "fairness, dignity, respect and sensitivity," in violation of the first sentence of art. I, § 9m.<sup>2</sup>

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

<sup>2</sup> The Board also concluded that prosecutor Schilling violated the introductory provision of WIS. STAT. ch. 950, WIS. STAT. § 950.01, but the Board does not pursue that issue on appeal.

The Crime Victims Rights Board may issue private and public reprimands to public officials who violate the constitutional and statutory rights of crime victims. *See* WIS. STAT. § 950.09(2)(a). Under this authority, the Board issued prosecutor Schilling a private reprimand, and he petitioned for judicial review of that decision.

On judicial review, the trial court rejected prosecutor Schilling's contentions that the reprimand impermissibly infringed on prosecutorial discretion and on a prosecutor's immunity from damages. The court did not address Schilling's argument that the "fairness, dignity and respect" language is unduly vague and that penalizing him under such language violates Schilling's due process rights. Rather, the trial court concluded that the first sentence of WIS. CONST. art. I, § 9m does not contain a distinct enforceable right. The court reasoned that the first sentence of the amendment

illuminates the general purpose of the constitutional amendment and thereby provides guidance to the CVRB and to the courts in applying the specific rights described in the second sentence and in WIS. STAT. § 950.04(1v)....

... [I]t did not create a separate, enforceable right in crime victims to be treated with fairness, dignity and respect for their privacy.

Consequently, the trial court reversed the Board decision, resulting in this appeal. On appeal, the Board contests the trial court's constitutional interpretation.

## DISCUSSION

The "victims of crime" amendment, WIS. CONST. art. I, § 9m, provides: "This state shall treat crime victims, as defined by law, with fairness,

dignity and respect for their privacy.” The provision then goes on to specify nine particular rights:

This state shall ensure that crime victims have all of the following privileges and protections as provided by law: timely disposition of the case; the opportunity to attend court proceedings unless the trial court finds sequestration is necessary to a fair trial for the defendant; reasonable protection from the accused throughout the criminal justice process; notification of court proceedings; the opportunity to confer with the prosecution; the opportunity to make a statement to the court at disposition; restitution; compensation; and information about the outcome of the case and the release of the accused.

After reciting these specific rights, the amendment states: “The legislature shall provide remedies for the violation of this section. Nothing in this section, or in any statute enacted pursuant to this section, shall limit any right of the accused which may be provided by law.”

WISCONSIN STAT. ch. 950 codifies WIS. CONST. art. I, § 9m.

WISCONSIN STAT. § 950.01, entitled “legislative intent,” provides:

[T]he legislature declares its intent, in this chapter, to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity; and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants.

At the time this case arose, WISCONSIN STAT. § 950.04(1v), entitled “Rights of Victims,” listed thirty-seven specific rights. No one suggests that any of these specified rights were violated when the prosecutor played the 911 tape.

The Board contends that the first sentence of WIS. CONST. art. I, § 9m is an unambiguous, self-executing provision. The Board argues: “The initial sentence of the amendment stands in distinct contrast to the ‘privileges and

protections’ that require legislative action to give operational meaning to them.... [T]he language directly limits the otherwise broad power of the state to treat victims of crime.” According to the Board, unlike the remaining provisions of art. I, § 9m, “[n]o further action needs to be taken by the Legislature to give definition to those duties or to put them into operation. The rights ... are ‘self-executing.’”

Alternatively, the Board contends that even if WIS. CONST. art. I, § 9m is ambiguous, the legislative history, and the wording of the referendum leading to its passage, clearly show an intent to create a distinct enforceable right to fairness, dignity, and respect. In summary, the Board concludes that the amendment must be read to have two distinct parts: the self-executing, enforceable first sentence, and the remaining provisions that the legislature must implement.

Prosecutor Schilling also contends that the language of WIS. CONST. art. I, § 9m is unambiguous. Under his interpretation, the first sentence is a statement of general purpose only, clearly separated from the list of express enforceable rights subsequently enumerated. Schilling asserts that legislative history supports his position. In particular, he points to an earlier, unapproved version of the amendment in which the right to be treated with fairness, dignity, and respect for privacy was included in an itemized list of specific rights “as provided by law.” Prosecutor Schilling contends that the legislature demonstrated its intent that the “fairness, dignity and respect” language is not a distinct “right,” but rather a general statement of purpose, by omitting it from the final list of specified rights.

We certify this case because it presents an important question of statewide concern to crime victims and prosecutors. There is no dispute that the

goal of the “victims of crime” amendment is that crime victims be treated with fairness, dignity, and respect. However, it is far from clear whether there is a distinct enforceable right to be treated with fairness, dignity, and respect. Further, if there is a distinct enforceable right to be treated with fairness, dignity, and respect, it would seem that a limiting interpretation of this language is called for because, as interpreted by the Board, the constitutional language, via WIS. STAT. ch. 950, gives the Board largely unlimited power to sanction prosecutors when the Board determines a prosecutor’s behavior toward a crime victim is less than respectful.

The answer to this question has potentially dramatic consequences for victims and prosecutors. If victims have a broad right to be treated with fairness, dignity, and respect, there are many situations in which they would be accorded rights not covered by the specified rights. The benefits of such a catchall provision to crime victims seem obvious. At the same time, if this court concludes that victims have this broad right to be treated with fairness, dignity, and respect, such a decision may have a chilling effect on prosecutors who will, predictably, contend that they do not know with confidence what is prohibited. We believe the supreme court should decide this constitutional issue of undeniable statewide importance.

